No. 17-35634

In the United States Court of Appeals for the Ninth Circuit

MOHAMED SHEIKH ABDIRAHMAN KARIYE; FAISAL NABIN KASHEM; RAYMOND EARL KNAEBLE IV; AMIR MESHAL; STEPHEN DURGA PERSAUD,

Plaintiffs-Appellants,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States; CHRISTOPHER A. WRAY, Director, Federal Bureau of Investigation; CHARLES H. KABLE IV, Director, Terrorist Screening Center,

Defendants-Appellees.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

On Appeal from the United States District Court for the District of Oregon
Portland Division
Case No. 3:10-cv-00750-BR

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INTRODUCTION

The government has banned Plaintiffs from flying for eight years, with no end in sight, leaving them separated from family members, limited in employment opportunities, unable to fulfill religious obligations, and stigmatized. Defendants justify this blacklisting based on a speculative prediction that Plaintiffs might someday commit violent acts of terrorism, but none of the Plaintiffs has ever committed any such act, and each has disclaimed any intention to do so.

The Due Process Clause does not tolerate such draconian restrictions on liberty without rigorous procedural protections that Defendants' redress system fails to provide.

Defendants contend that the blacklisting criteria satisfy vagueness requirements, but they still do not explain what *conduct* permits the government to decide that someone "represents" a sufficient "threat" to be blacklisted. Defendants' failure to identify such conduct is consistent with Plaintiffs' experts' testimony showing that there are no valid indicators by which to predict exceedingly rare acts of terrorism. Defendants rely on cases upholding pretrial detention based on predictions of dangerousness, but those judgments are permissible only when a judge or other neutral decisionmaker couples them with findings of *past* violent conduct made pursuant to rigorous procedures. Absent such protections, the blacklisting criteria do not satisfy even minimal vagueness

requirements, let alone the heightened requirements applicable where, as here, the government's sanction relies on First Amendment-protected speech, belief, and conduct.

The blacklisting redress process also fails to satisfy minimal procedural due process requirements. Defendants contend that Plaintiffs had a meaningful opportunity to contest the allegations against them, but Defendants do not dispute that the government withheld reasons for their blacklisting, all of the evidence it relied on, and exculpatory information that may well refute that evidence.

The redress process also provides no hearing. Defendants still cannot point to *any case* where a court has permitted the government to deprive citizens of such significant liberty interests without a hearing. To affirm, this Court would have to lower the standard for minimal due process far below any standard set before.

The district court justified its departure from traditional due process requirements based on its novel "undue risk to national security" standard, but Defendants do not defend that approach. Instead, they argue that they need not disclose classified information. This is a red herring. Defendants have never shown that the information they withheld *is actually classified*. And even if some of it is, Defendants must use mechanisms that courts have consistently required to ensure that individuals can challenge deprivations of liberty while safeguarding the government's interest in secrecy. This Court has held that failure to use these

mechanisms violates due process, and in its prior opinion in this case, the Court suggested the district court look to the Classified Information Procedures Act. The district court ignored that guidance.

Finally, Defendants ask this Court to disregard two prior opinions holding that the district court retains jurisdiction over substantive claims challenging continued blacklisting. Defendants claim that tweaks to the blacklisting redress process have undermined those holdings, but they have not. The Terrorist Screening Center (TSC) still plays a central role in blacklisting-related decisions; judicial review of those decisions still requires review of TSC orders; and any remedy still requires TSC action. The revised blacklisting redress process, moreover, lacks a hearing, adequate administrative record, or other safeguards that can only come through district court fact-finding.

This Court should again reverse the district court's judgment, remand this case for application of criteria and procedures that comply with the Due Process Clause, and direct the district court to adjudicate Plaintiffs' substantive claims.

ARGUMENT

I. THE NO FLY LIST CRITERIA ARE UNCONSTITUTIONALLY VAGUE.

The Supreme Court recently reaffirmed that the Fifth Amendment's vagueness doctrine "guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018)

(citation omitted). The No Fly List criteria fail this "first essential of due process." *See Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

At no point in this lawsuit—before this Court or the district court—have Defendants identified any conduct that the blacklisting criteria proscribe. Nor could they; the criteria proscribe nothing, leaving key terms like "represent" and "threat" undefined. In practice, they also penalize First Amendment-protected speech and association. Even when describing the criteria, Defendants say only what the criteria "relate to," not what they actually proscribe. Defendants' Answering Brief 15, ECF No. 31 ("Defs.' Br."). By any measure, they are impermissibly vague.

Defendants' arguments that the criteria are sufficiently precise contradict controlling authority and the facts of this case. Defendants first argue for a relaxed standard of clarity because placement on the No Fly List is a civil, not criminal, penalty. Defs.' Br. 23. But if that categorical distinction ever held weight, it holds none after *Dimaya*, which held "the most exacting vagueness standard must apply" in that civil case. 138 S. Ct. at 1213. Justice Gorsuch's concurrence emphasized the necessity of "[f]air notice of the law's demands . . . whether under the banner of the criminal or the civil law" and observed that "today's civil laws regularly impose penalties far more severe than those found in many criminal statutes." *Id.* at 1228-29 (citing as examples forfeiture and professional license revocation). The

No Fly List's complete and indefinite ban on air travel falls squarely within this category of "extravagant punishments" in the civil context. *See id.*; *see also* Plaintiffs' Opening Brief 35-36, ECF No. 13 ("Pls.' Br.") (describing severe consequences of blacklisting). An "exacting vagueness standard" must apply. *See Dimaya*, 138 S. Ct. at 1213.

Defendants, moreover, fail to account for "perhaps the most important factor affecting the clarity that the Constitution demands": whether the sanction could chill First Amendment-protected speech or association. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). The blacklisting criteria do not merely "abut[] upon sensitive areas of basic First Amendment freedoms," *see Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); in practice, they actually penalize the exercise of such freedoms. That is plain from Defendants' disclosures to Plaintiffs, which identified online statements, associations, and purported religious or political views as bases for their blacklisting. *See* Pls.' Br. 5-11, 34. For this additional reason, heightened clarity is necessary.[1]

[1] Contrary to Defendants' unsupported assertion, *see* Defs.' Br. 25-26, Plaintiffs need not bring separate First Amendment claims in order to challenge the No Fly List criteria on vagueness grounds. "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 304 (2008).

Defendants do not contend that the criteria could meet that stringent standard. Instead, they repeat the district court's argument that the criminal statutes to which the criteria refer "are sufficiently clear to a person of ordinary intelligence." Defs.' Br. 24; *see also* ER 79 (holding that "the violent acts of terrorism that underpin the criteria are well-defined and readily understandable"). That argument misses the point. Plaintiffs have not violated those statutes, and the government does not accuse them of doing so. Nor do Plaintiffs argue that those statutes are themselves unclear. Rather, they challenge criteria that penalize posing a "threat" of committing one of these acts. This potentially penalizes an entire universe of conduct—including speech, association, and belief—*other than* the conduct that the statutes proscribe.

Defendants also argue that Plaintiffs cannot challenge the blacklisting criteria because, according to Defendants, Plaintiffs' "own conduct falls clearly within the criteria." Defs.' Br. 24. Defendants are wrong, legally and factually. First, *Johnson* and *Dimaya* "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 135 S. Ct. at 2561; *see also id*. ("If we hold a statute to be vague, it is vague in all its applications."). *Dimaya* found the immigration code's definition of "crime of violence" unconstitutionally vague even though the

respondent was convicted of first-degree burglary, which, as the dissent noted, clearly fell within the ambit of the statute. 138 S. Ct. at 1214 n.3, 1250-52.

Second, *none* of the alleged conduct Defendants disclosed as a basis for blacklisting Plaintiffs—including posting comments online, traveling abroad, and associating with mosque congregants—was "clearly proscribed" under the criteria or any other law. *See* Defs.' Br. 24.

Third, the government kept the blacklisting criteria secret until well after Plaintiffs filed this lawsuit. *See* ER 113-14 (noting that government did not disclose criteria); ER 591 (disclosing criteria for first time). Thus, even if Plaintiffs and the Court could discern what conduct the criteria proscribe now—which, as explained above, is impossible—Plaintiffs did not have *any* notice, let alone "fair notice," that their (entirely lawful) conduct could have led to placement on the No Fly List when it occurred. *See Dimaya*, 138 S. Ct. at 1212.

Defendants also argue against Plaintiffs' facial vagueness challenge on the grounds that the blacklisting criteria "are clearly valid in the majority of intended applications." Defs.' Br. 25 (citing *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1275 (9th Cir. 2017)). Even if *Dimaya* and *Johnson* do not foreclose this argument, it is wrong. To begin, it takes relevant language out of context. In *First Resort*, this Court quoted the Supreme Court's holding in *Hill v. Colorado*, 530 U.S. 703, 733 (2000): "[S]peculation about possible vagueness in hypothetical situations not

before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." 860 F.3d at 1275. Here, Plaintiffs are not citing "hypothetical situations" or "hypertechnical theories" regarding what the criteria cover; they are challenging the criteria both facially and as applied to their own alleged behavior. *See id.*; *Hill*, 530 U.S. at 733.

Moreover, Defendants' argument that the criteria are "clearly valid in the majority of intended applications" is entirely unsupported: virtually no information is publicly available about how the government typically applies or intends to apply the criteria. The criteria, moreover, are so standardless and indeterminate on their face that Plaintiffs and the public "must necessarily guess at [their] meaning," *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926), and officials implementing the criteria must make the kind of arbitrary and "wholly subjective judgments" that the Due Process Clause does not tolerate. *See Williams*, 553 U.S. at 306.

Defendants rely heavily on cases in which courts rejected vagueness challenges to government measures requiring assessments of the risk of future criminal conduct. Defs.' Br. 26-29. But those cases actually demonstrate the vagueness of the No Fly List criteria by comparison, for three reasons. First, the measures at issue in those cases all required a prior judicial determination of at least probable cause to believe that an individual *had already engaged in*

proscribed conduct. *See Schall v. Martin*, 467 U.S. 253, 276 (1984) (judicial probable cause determination for juvenile detainees); *Jurek v. Texas*, 428 U.S. 262 (1976) (conviction for capital offense); *United States v. Salerno*, 481 U.S. 739 (1987) (serious felony charges).[2] These cases only upheld future dangerousness predictions after a judicial determination that past proscribed conduct had already occurred. The No Fly List criteria lack that basic safeguard. It is one thing to predict that someone found to have committed a crime may be dangerous, but something entirely different to make that prediction absent any history of criminal activity.

Second, unlike predictions of dangerousness in pretrial or sentencing contexts, which rest on decades of judicial practice, neither the government nor social science researchers have identified indicators that can reliably assess the likelihood that someone will commit the extremely rare acts of terrorism referenced in the criteria. *See* Pls.' Br. 36-41. Thus, although Defendants assert that determinations under the blacklisting criteria are based on "real-world conduct," Defs.' Br. 29, they have neither defined what that conduct is nor offered evidence that it constitutes a valid predictor of violent terrorist acts.

Third, in the cases Defendants cite, the Supreme Court emphasized available procedural protections designed to mitigate the potential for error arising from the

[2] *Salerno* did not address constitutional vagueness arguments.

inherent vagueness of the concept of risk. Most obviously, dangerousness determinations take place at *hearings*, where the government must present its reasons and evidence in support of its assertion of dangerousness. *See Schall*, 467 U.S. at 279 ("Given the right to a hearing, to counsel, and to a statement of reasons, there is no reason that the specific factors . . . must be specified in the statute."); *Jurek*, 428 U.S. at 276 (challenged law assured that jury would have "all possible relevant information" about the defendant); *cf. Salerno*, 481 U.S. at 751 ("[T]he procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination."). The No Fly List redress process lacks such basic protections. Unlike in *Schall*, Plaintiffs here can readily identify "additional procedures that would significantly improve the accuracy of the determination," *see* 467 U.S. at 277—full notice of the reasons and evidence on which the government is relying to blacklist them, and an adversarial hearing before a neutral decisionmaker.

Ultimately, the touchstone of the vagueness inquiry is "fair notice and fair enforcement." *Vill. of Hoffman Estates*, 455 U.S. at 498. The No Fly List criteria fail on both counts. Setting aside that the criteria provide zero notice of what they proscribe, and that they penalize constitutionally protected conduct, they exhibit none of the characteristics that have led courts to extend greater latitude to provisions in other contexts. They contain no temporal limitation, *see Schall*, 467

U.S. at 269-70; they lack a scienter requirement, *see Vill. of Hoffman Estates*, 455 U.S. at 499; they do not involve only economic regulation, *see Cal. Pac. Bank v. FDIC*, 885 F.3d 560, 571 (9th Cir. 2018); and they are free of any "administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations," *see Vill. of Hoffman Estates*, 455 U.S. at 504. And because the criteria were adopted in secret by the executive, with no notice to the public or any observance of rule-making procedures, they do not carry the weight of congressional enactments and are due no deference. *See Dimaya*, 138 S. Ct. at 1212 (vagueness doctrine is a corollary of separation of powers, requiring that "Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not").

For all these reasons, the No Fly List criteria are unconstitutionally vague.

II. THE BLACKLISTING REDRESS PROCESS VIOLATES PROCEDURAL DUE PROCESS.

Once it has been determined that the Due Process Clause applies, "the question remains what process is due." *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). That question must be answered, and the Fifth Amendment's "essential constitutional promises" guaranteed, in all contexts without exception. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion); *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65

(1963) (emphasizing "imperative necessity" of safeguarding procedural due process rights even "under the gravest of emergencies").

The district court, however, permitted the government to withhold reasons, evidence, exculpatory information, and a hearing based on a unilateral and categorical assertion of "undue risk to national security"—a standard that the court fashioned from whole cloth. Defendants do not explicitly attempt to defend that standard, nor do they offer a sufficient basis for breaching time-honored due process principles here.

The test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), is the lodestar for determining the process due. Properly balanced, the *Mathews* factors compel the conclusion that the blacklisting redress procedures violate due process.

A. Plaintiffs' Continued Blacklisting Is a Significant Deprivation of Their Liberty.

Defendants attempt to minimize Plaintiffs' interests, but the first *Mathews* factor—the weight of the private interests affected—unequivocally favors Plaintiffs. Defendants cannot reasonably dispute that blacklisting has inflicted severe consequences on Plaintiffs, both in terms of lost liberty and the stigmatization flowing from a "complete and indefinite ban on boarding commercial flights." ER 132. Nor do Defendants contest the district court's findings that "the realistic implications of being on the No Fly List are potentially far-reaching," ER 195, including long-term separation from family members, loss

of employment, and "the significant stigma of being a suspected terrorist." ER 135, 137-38; *see also Mohamed v. Holder*, 995 F. Supp. 2d 520, 528 (E.D. Va. 2014) (holding that "[t]he impact on a citizen who cannot use a commercial aircraft is profound" and describing range of consequences of blacklisting).

Defendants instead argue that Plaintiffs' interests "are subject to reasonable regulation." Defs.' Br. 31. But that argument is grounded in substantive, not procedural, due process, as the cases Defendants cite make clear. *See Haig v. Agee*, 453 U.S. 280, 306 (1981) (addressing whether revocation of passport impermissibly burdens freedom to travel); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438 (9th Cir. 1996) (challenge to Cuba travel ban "appears to be a substantive due process claim"). None of those cases involved a complete ban on all commercial flight; that they upheld measures affecting some travel says little about the weight of Plaintiffs' interests or the process due here.

Defendants still have identified *no case* that has upheld such a significant deprivation of a citizen's liberty based on redress procedures as deficient as those used here. Instead, Defendants ask the Court to disregard cases considering liberty or property interests in other contexts. They argue that because the due process inquiry is inherently flexible, comparisons to other cases are unduly "mechanical." Defs.' Br. 32-35. But the government has never before adopted a process to deprive citizens of significant liberty interests without complete notice of its

reasons or an adversarial hearing, so this Court must look to analogous contexts. And the comparisons are revealing: Defendants do not dispute that courts routinely require more rigorous procedures for lesser deprivations, *see* Pls.' Br. 46-47; that courts uniformly mandate rigorous procedures that are absent here when faced with comparable restrictions on liberty, *see id.* at 47-48; and that non-citizens in analogous contexts receive virtually all of the protections Plaintiffs have been denied, *see id.* at 48-49.

B. Defendants Do Not Rebut Plaintiffs' Showing That the Risk of Blacklisting Error Is Extremely High.

The second *Mathews* factor also weighs heavily in Plaintiffs' favor. The risk of error here is extraordinarily high because of the vagueness of the criteria, the inherent unreliability of blacklisting determinations, and the low evidentiary threshold for making them.

Defendants do not directly dispute the likelihood of error, nor do they take issue with Plaintiffs' experts' conclusion that, as an empirical matter, the government's predictive judgments underlying its placement of Plaintiffs on the No Fly List entail "an extremely high risk of error." *See* ER 350 ¶ 35, 355 ¶ 48; *see also* ER 318 ¶ 24, 320 ¶ 27. Instead, Defendants argue that "due process does not forbid predictive judgments." Defs.' Br. 59. But that hardly suffices to establish that *these* predictive judgments pass constitutional muster. To state the obvious: not all predictions are equally justified.

It is telling that Defendants have never actually defended the validity of their predictions in this context, either before the district court or here. While Defendants initially stressed that No Fly List determinations are "predictive judgments" that Plaintiffs might commit "violent acts of terrorism" in the future, *see* Defs.' Cross-Mot. for Summ. J. 47, 49, Dist. Ct. ECF No. 251, they changed their story after Plaintiffs submitted expert testimony showing that such predictive judgments are highly error-prone in this context. *See* ER 312, 355. Defendants then argued that a blacklisting decision is not a prediction about future conduct, but rather an assessment that an individual "poses a *present* threat." Defs.' Suppl. Reply Br. 3-4, Dist. Ct. ECF No. 304. Error, according to Defendants, would only arise from failure to apply the decision-making process fairly. *Id.* at 7-8. Without addressing Plaintiffs' expert testimony, the district court appeared to accept Defendants' altered position. ER 79-80. In yet another shift, Defendants have apparently abandoned that view, arguing again that No Fly List decisions are in fact predictive, but without defending the validity of their predictive judgments. Defs.' Br. 59-62.

Through all Defendants' shifts, Plaintiffs' expert testimony showing that these predictive judgments are inherently unreliable remains unrefuted. *See* Pls.' Br. 37-39. That testimony demonstrates that the government's predictive judgments about Plaintiffs are speculative and attenuated: because there *are* no

predictive indicators of terrorist violence (other than prior acts of terrorist violence), *see id.*, Plaintiffs have no way to demonstrate that they will *not* engage in such violence or otherwise violate the laws referenced in the No Fly List criteria. *See Nelson v. Colorado*, 137 S. Ct. 1249, 1256-57 (2017) (high risk of error where fee-recovery scheme required criminal defendants to prove their own innocence).

Defendants, moreover, misapprehend the import of that rate of error. Rather than calling for "setting aside the No Fly List entirely," Defs.' Br. 59, Plaintiffs have emphasized that the high likelihood of error reinforces the necessity of rigorous procedural safeguards that are designed to mitigate the risk of error—a requirement that this Court and the Supreme Court have reaffirmed in cases involving assessments of future dangerousness. *See* Pls.' Br. 3, 50-52; Pls.' Opp. Br. 18-19, Dist. Ct. ECF No. 267. Defendants ignore this authority and cite inapposite cases involving assessments of *past* unlawful conduct. *E.g.*, *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (suspicion of narcotics trafficking); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (material support to designated terrorist organization); *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965 (9th Cir. 2012) (alleged activities supporting terrorism).

Similarly, Defendants do not contest that the low evidentiary threshold for blacklisting—reasonable suspicion—further inflates the risk of error, since it permits the government to blacklist people even if it concludes they likely do not

meet the criteria. Defendants' explanation that reasonable suspicion requires "presently-known, articulable evidence," Defs.' Br. 38, underscores how low the standard is. In essence, the government's basis for subjecting people to a complete and potentially indefinite flight ban is some fact that can be put to words.

Rather than dispute that the risk of error arising from the use of the reasonable suspicion standard is extremely high, Defendants argue that the standard reflects a "societal judgment" about the appropriate distribution of that risk. Defs.' Br. 58 (citing *Santosky v. Kramer*, 455 U.S. 745, 755 (1982)). But no such societal judgment has taken place here. Unlike the statute at issue in *Santosky*, the blacklisting criteria and the reasonable suspicion standard are not legislative enactments, nor did they result from a public rule-making process. The Supreme Court, moreover, has repeatedly held that the "clear and convincing evidence" standard must apply "when the individual interests at stake . . . are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky*, 455 U.S. at 756 (citing *Addington v. Texas*, 441 U.S. 418, 424 (1979)); *see also Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011). The government's blacklisting scheme falls squarely within the circumstances mandating a heightened standard of proof, *see* Pls.' Br. 43-44—a conclusion that Defendants do not meaningfully contest.

C. The Blacklisting Redress Process Lacks Key Safeguards That Would Reduce the Risk of Error.

As explained above, the blacklisting process itself produces a very high risk of error. But the redress process does little to minimize that risk. Defendants cannot reasonably dispute that the constitutional minima Plaintiffs seek—reasons, evidence, exculpatory information, and a hearing—would have significant "probable value" in reducing that risk of error. *See Mathews*, 424 U.S. at 335.

1. The redress process does not provide meaningful notice.

As set forth in Plaintiffs' Opening Brief, decades of due process doctrine establish that the government must provide full notice of the reasons on which it is relying to continue to blacklist Plaintiffs. *See* Defs.' Br. 55-58. The government must also disclose the evidence in support of those reasons and information in its possession that is favorable to Plaintiffs. *Id.* at 58-64.

Defendants do not argue that they met these fundamental notice obligations. Indeed, their description of the notice provided under the redress process only highlights its inadequacy. That Plaintiffs "were notified of their No Fly List status" and told "the specific criterion under which they [were] placed on the No Fly List" says nothing about the adequacy of the notice. *See* Defs.' Br. 39. Neither discloses "the factual basis for the action"—one of the "essential components of due process." *See Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 318 (D.C. Cir. 2014) (requiring such notice in national security context). A summary of reasons,

moreover, cannot constitute "reasonable notice," *see* Defs.' Br. 39, where it affirmatively *omits* reasons relied upon for each Plaintiff's continued blacklisting, withholds *all evidence* against them—despite explicitly referring to such alleged evidence—and conceals exculpatory information. Submission of the withheld information *ex parte* and *in camera* plainly does not cure these deficiencies. *See id.*; *Al Haramain*, 686 F.3d at 980 ("One would be hard pressed to design a procedure more likely to result in erroneous deprivations."). *Ex parte* review is the opposite of notice to Plaintiffs, and it results in the kind of "one-sided and potentially insufficient . . . record" that the district court concluded was a major defect in the original redress process. *See* ER 143-44.

Defendants assert that "Plaintiffs can meaningfully respond" to the information in the unclassified summaries they received. Defs.' Br. 52-54. It is not possible to meaningfully respond to *undisclosed* reasons and evidence. *See Al Haramain*, 686 F.3d at 986 ("[B]ecause AHIF-Oregon could only *guess* (partly incorrectly) as to the reasons for the investigation, the risk of erroneous deprivation was high."). Mr. Kariye could not establish that the hearsay testimony against him was unreliable or that the witnesses from whom it was obtained lacked credibility, because neither their identities nor their actual statements were disclosed. *See* ER 419-21. Similarly, Mr. Meshal could not provide critical context showing bias and coercion in the statements and evidence against him. ER 480-81, SER 746-47. Mr.

Knaeble could not "tailor [his] submission" to the government's concerns or "rebut the factual premises" for his blacklisting. *See Ralls*, 758 F.3d at 320.

Defendants attempt to justify the one-sentence disclosure to Mr. Knaeble by citing *Tarhuni v. Lynch*, 129 F. Supp. 3d 1052 (D. Or. 2015). *See* Defs.' Br. 53-54. But the fact that some plaintiff in another case successfully guessed the government's undisclosed reasons for blacklisting him does not prove that the single sentence provided to Mr. Knaeble allows a meaningful response. It plainly does not.

Notably, Defendants do not defend the district court's erroneous "undue risk" standard; instead, they urge that "due process does not require disclosure of classified information." Defs.' Br. 42. That argument is a red herring. First, Plaintiffs have never sought full disclosure of properly classified information, nor do they argue, as Defendants suggest, that due process mandates it as a general matter. *Compare id. with* Pls.' Opp. Br. 24, Dist. Ct. ECF No. 267 ("Plaintiffs do not seek full, public release of sensitive national security information.").

Rather, Plaintiffs have consistently maintained that, to the extent the redress process implicates evidence that is classified or otherwise privileged, the district court should have required Defendants to identify the information that is actually classified, and then adopted minimization procedures used in other national security contexts—including, as this Court suggested earlier in this case, mitigation

measures under the Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3. *See Latif v. Holder*, 686 F.3d 1122, 1130 (9th Cir. 2012); Pls.' Br. 3-4, 25, 58, 61-62, 77. By focusing on the wrong question—whether due process requires disclosure of classified information—Defendants fail to acknowledge or address the mechanisms that courts and administrative bodies routinely use to adjudicate claims involving classified information, including in the national security context. *See* Pls.' Br. 76-78.

Second, Defendants have never attempted to show that information they have withheld is actually classified. They instead use that label to cover information that may *not* be classified or otherwise properly withheld from Plaintiffs. Critically, Defendants have never invoked any privilege, including the state secrets privilege. Invocation would require adversarial briefing and judicial review of the asserted basis for the privilege using time-tested procedures. Defendants also concede that the notification letters to Plaintiffs only summarized *unclassified*, *unprivileged* information. *See* ER 284-85. And Defendants do not explain why the allegedly adverse evidence referenced in the summaries—including Plaintiffs' own statements—could be withheld if it is not classified. Thus, Defendants' arguments against disclosure of classified information have

little, if any, relevance to the adequacy of the notice to Plaintiffs.[3]

Third, the cases on which Defendants rely to argue for incomplete notice are readily distinguishable. *See* Defs.' Br. 42-47. Those cases all involve the property interests of organizations or non-citizens outside the United States. *See Zevallos v. Obama*, 793 F.3d 106 (D.C. Cir. 2015) (Peruvian national whose assets were blocked); *Ralls*, 758 F.3d at 301 (Chinese nationals subject to divestment order); *Jifry v. F.A.A.*, 370 F.3d 1174 (D.C. Cir. 2004) (revocation of Saudi Arabian pilots' licenses); *Holy Land Found. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (blocking of charitable foundation's assets); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001) ("NCRI") (designation of Iranian organizations as "foreign terrorist organizations"). While such interests are important, they do not weigh as heavily as the significant deprivation of a citizen's liberty and the personal stigma that a ban on all air travel, potentially for life, entails. Additionally, nearly all of these cases involved deprivations of property based on past conduct, not predictive assessments of individuals' dangerousness,

[3] For these reasons, Plaintiffs renew their objection to Defendants' submission of materials to this Court *ex parte* and *in camera*. *See* ECF No. 26. The district court reached the issue of whether to consider materials *ex parte* and *in camera* only because it erroneously applied the "undue risk" standard, thereby improperly deferring to the government's sweeping secrecy arguments absent any invocation of privilege. The Court need not consider the secret materials that the government submitted in adjudicating this appeal, and doing so would be inconsistent with fundamental due process principles. *See id.*

as in the blacklisting context. *Zevallos*, 793 F.3d at 110 ("[T]he designated person must argue that whatever rationale led Treasury to designate him under the appropriate statute . . . was never true or is no longer true."); *Ralls*, 758 F.3d at 301 (whether purchase of U.S. companies violated foreign-ownership limitations); *Holy Land Found.*, 333 F.3d at 156 (alleged support to foreign terrorist organization); *NCRI*, 251 F.3d at 192 (alleged engagement in terrorist activities). Even so, in notable respects, the affected organizations and individuals in those cases received more robust notice than Plaintiffs received here, including access to underlying evidence. *See Zevallos*, 793 F.3d at 117 (foreign national received evidence on which government relied); *Ralls*, 758 F.3d at 319 (Chinese nationals subject to divestment order had due process right to underlying evidence); *Jifry*, 370 F.3d at 1183 (non-citizen pilots received materials under 49 C.F.R. § 1540.117); *Holy Land Found.*, 333 F.3d at 164 (evidence supporting designation); *NCRI*, 251 F.3d at 209 (due process mandates access to unclassified evidence supporting designation).[4]

2. The redress process provides no hearing.

Defendants identify no case—and Plaintiffs remain unaware of any—in which a court has upheld a significant deprivation of a citizen's liberty without a

[4] *Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002), did not address the scope of notice required under the Due Process Clause.

hearing. Instead, Defendants again mischaracterize Plaintiffs' position: Plaintiffs do not suggest that due process requires a live hearing "in every instance." *See* Defs.' Br. 54. But due process does require a live hearing where, as here, significant liberty interests are at stake and the affected individual's credibility is at issue.

Defendants point to the district court's ruling that "due process does not require a live or adversarial hearing in this context," ER 92, but the charitable organization designation cases the district court cited in support of that conclusion are not instructive here. Again, those cases turned primarily on an analysis of the organizations' past financial transactions. *See Al Haramain*, 686 F.3d at 977-79; *Holy Land Found.*, 333 F.3d at 162. Here, Defendants' determinations involved both the *credibility* of Plaintiffs' responsive submissions and the government's own error-prone predictive judgments about the likelihood of *future* events.

Notably, Defendants fail to address the importance of a hearing when outcomes turn on credibility, as they do for Plaintiffs. *See, e.g.*, *Abovian v. INS*, 219 F.3d 972, 980 (9th Cir. 2000) (due process violation where Board of Immigration Appeals makes "an independent adverse credibility finding" without giving petitioner an opportunity to establish credibility at a hearing). Defendants' decisions to continue blacklisting Plaintiffs rested in large part on questions of fact and assessments of Plaintiffs' (and others') credibility, but Plaintiffs never had an

opportunity to establish their credibility (or test others') at a live hearing before a neutral decisionmaker.[5]

Defendants' attempt to refute Plaintiffs' due process right to confront and cross-examine adverse witnesses is similarly scant. *See* Defs.' Br. 56 (analogizing to terrorism designation cases). The Supreme Court has emphasized that "where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *see also Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681 (9th Cir. 2005) (non-citizens in removal proceedings have due process right to "a reasonable opportunity to confront and cross-examine witnesses"). Defendants' blacklisting determinations plainly hinged on factual questions about Plaintiffs' and others' alleged conduct. But in reaching those determinations, Defendants relied heavily on statements from individuals "whose memory might be faulty" or who may have been "motivated by malice, vindictiveness, intolerance, [or] prejudice." *See Goldberg*, 397 U.S. at 270. Those individuals include, for instance, the FBI agents who coercively "interviewed" Mr. Meshal during his months-long detention in East Africa. *See* ER 479-80, SER 746-47. They also include the individuals whose hearsay-within-hearsay statements formed the basis for Mr.

[5] That the government removed two individuals from the No Fly List based on paper submissions, *see* Defs.' Br. 56, in no way demonstrates that denial of a hearing as a general matter comports with due process.

Kariye's continued blacklisting. *See* ER 420. Due process does not permit the unchecked use of hearsay coupled with a complete denial of any opportunity to confront witnesses, contest the accuracy and completeness of their accounts, and probe other factors relevant to their credibility.

Defendants repeat the district court's conclusory determination that hearings would be "inappropriate in this context." Defs.' Br. 55. But that ruling ignored the body of due process cases to the contrary and lacked a compelling justification. Courts and administrative bodies have regularly held hearings in sensitive national security cases involving deportation, *Rafeedie v. INS*, 880 F.2d 506, 508-09 (D.C. Cir. 1989), detention at Bagram Air Force Base, *Al Maqaleh v. Hagel*, 738 F.3d 312, 327 (D.C. Cir. 2013), *vacated as moot as to certain petitioners by Amanatullah v. Obama*, 135 S. Ct. 1545 (2015), pretrial bond hearings, *United States v. Hir*, 517 F.3d 1081, 1091 (9th Cir. 2008), and various other contexts where courts use CIPA procedures. *See* 18 U.S.C. app. 3 § 8(c). Similarly, the TSA utilizes an adversarial process that includes a live hearing before an administrative law judge for individuals whose transportation-related licenses are denied or revoked on the basis of "threat assessments." 49 C.F.R. § 1515.11.

These various contexts show that Defendants can provide hearings notwithstanding the potential that they will implicate sensitive national security matters. The probative value of such hearings far outstrips any administrative

burden on the government, which is no doubt why no court has ever upheld a comparable deprivation of liberty without a hearing.

D. Providing Key Procedural Safeguards Does Not Threaten Government Interests.

Despite Defendants' attempt to cast the government's interests broadly, the final *Mathews* factor does not weigh significantly in the government's favor. The third prong of the *Mathews* test focuses on the "interest of the government in using the current procedures rather than additional or different procedures." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). And where the risk of error is high, the third *Mathews* factor is less important than minimizing that risk. *See Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995) (discounting government interest "because of the enormous risk of error and the substantial personal interests involved"). Properly defined, the government's interests are weaker than Defendants suggest and are not at odds with the additional protections due process mandates.

Defendants and the district court characterize the government's interest as encompassing aviation and national security. Defs.' Br. 36; ER 69-70. But the Supreme Court has long framed the government interest in terms of the *difference* between the status quo and alternate procedures. *See Plasencia*, 459 U.S. at 34. Thus, the government interest here is not its interest in using the No Fly List in general, but its interest in using the current redress procedures instead of others

that would reduce the risk of error in blacklisting determinations while doing more to protect Plaintiffs' liberty. Those alternate, risk-mitigating procedures do not threaten the government's broader interests in aviation and national security.

Even if the government's broader interests were at stake, they would have to be considered in light of additional protocols that are available to accommodate those interests, including repatriation procedures—advance notice of travel reservations on U.S.-based carriers, early airport arrival, heightened screening—that the government has already utilized to enable Plaintiffs and other blacklisted citizens stranded overseas to return to the United States. *See* ER 609-10. Contrary to Defendants' suggestion, *see* Defs.' Br. 41 n.3, the availability of those procedures is relevant in assessing the government's claim that it must maintain the present system to protect aviation and national security. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 59 (1993) (holding in forfeiture context that "[i]n the usual case, the Government . . . has various means, short of seizure, to protect its legitimate interests"); *Krimstock v. Kelly*, 306 F.3d 40, 65 (2d Cir. 2002) (government's interest in retaining seized items did not outweigh individuals' due process rights because government could protect its interests by other measures short of continued seizure). That the government was able to implement a straightforward process enabling blacklisted individuals to fly to the

United States, *see* ER 609-10, shows that the government's interest in a complete ban on all commercial flight is far weaker than Defendants suggest.

The second government interest that Defendants assert—the interest in protecting against disclosure of national security information—is more directly tied to the use of alternate redress procedures. But Defendants fail to account for the mechanisms courts and administrative bodies have long used to preserve legitimate government interests in secrecy while providing individuals a meaningful opportunity to challenge the deprivation of a protected interest. Due process requires the government to utilize such mechanisms. *See Al Haramain*, 686 F.3d at 984 (describing mechanisms). Consistent with that requirement, this Court advised that the district court should consider using CIPA "to handle discovery of what may be sensitive intelligence information." *Latif*, 686 F.3d at 1130.[6] The district court ignored that instruction.

Perhaps recognizing that the district court did not adhere to this requirement, Defendants focus on whether due process "requires disclosure of classified information." Defs.' Br. 42. As explained above, Defendants miss the point, both

[6] CIPA-like procedures would allow the government to use, for example, unclassified summaries or factual stipulations in lieu of classified evidence, so long as the substitute disclosures give each Plaintiff "substantially the same ability to make his defense as would disclosure of the specific classified information." *See* 18 U.S.C. app. 3 §§ 4, 6(c). As explained above, the government's blacklisting redress procedures did not give Plaintiffs substantially the same ability to respond to the allegations against them as would disclosure of the underlying information.

because they have failed to demonstrate that the information they have withheld is actually classified and because, even if it were, they still must use mitigation procedures this Court required in *Al Haramain* to safeguard due process. Courts use similar measures in contexts ranging from deportation to pretrial detention. *See Rafeedie*, 880 F.2d at 508-09; *Rafeedie v. INS*, 795 F. Supp. 13, 19 (D.D.C. 1992); *Hir*, 517 F.3d at 1091; *United States v. El-Hage*, 213 F.3d 74, 82 (2d Cir. 2000). Defendants cannot withhold meaningful notice and a hearing based on the mere potential that those safeguards would implicate national security information. Rather, if Defendants seek to withhold information, they must properly invoke a privilege by reference to specific information, according to the procedures courts have devised for the adjudication of such privileges. They have never done so, and the district court erred in declining to require them to do so.

III. JURISDICTION OVER PLAINTIFFS' SUBSTANTIVE CLAIMS NECESSARILY LIES IN THE DISTRICT COURT.

In *Ibrahim v. DHS*, 538 F.3d 1250 (9th Cir. 2008), and again in *Latif v. Holder*, this Court held the district court has jurisdiction over individuals' substantive challenges to their placement on the No Fly List. Defendants claim that their tweaks to the redress process undermine those cases, and therefore that this Court must directly review Plaintiffs' substantive challenges under 49 U.S.C. § 46110. Defendants' position rests on two principal arguments: (1) *Latif* and *Ibrahim* no longer apply because the TSA Administrator now has final say over

whether individuals are removed from the list, Defs.' Br. 66; and (2) their changes to the redress process undermine this Court's prior rationales favoring district court review, *id.* at 67-68.

Both of these arguments misrepresent how little TSC's role and the administrative procedures have changed. This Court's prior decisions remain controlling.

A. The TSA Administrator's Participation in the Redress Process Does Not Change the Jurisdictional Result.

Defendants claim that the TSA Administrator's new role as the "independent" final decisionmaker requires a different jurisdictional outcome than in *Latif*. Defs.' Br. 66-68. But rather than demonstrating the independence of the TSA Administrator's decision, Defendants' description of the decision-making process shows just how interwoven the functions of TSC and TSA remain.

Just as in *Ibrahim* and *Latif*, it is TSC, not TSA, which actually places individuals on the No Fly List. *See* Pls.' Br. 11. Defendants claim this is irrelevant because Plaintiffs are challenging the results of the redress process, not initial placement. But this is splitting hairs: if TSC had not placed Plaintiffs on the list and kept them listed during its audits, *see* ER 396 ¶ 28, and during the initial stages of the redress process, *cf.* ER 396 ¶¶ 28-29, 399-400, Plaintiffs would have no need

to bring this action.[7]

Moreover, after blacklisted individuals challenge their placement on the No Fly List, TSA not only relies on, but is limited by, the materials TSC chooses to include with its recommendation. Defs.' Br. 65 (quoting ER 230) ("TSC prepares a 'recommendation to the TSA Administrator' . . . and prepares materials supporting its recommendation, all of which are forwarded to TSA."). But TSC need not provide all the information it considered to the TSA Administrator; it need only provide information it deems "material" and "sufficient" to support its recommendation. Pls.' Br. 84 (citing ER 241 ¶ 18, 230 ¶ 5). Defendants state that the TSA Administrator can *request* more information from TSC if she wants it, Defs.' Br. 65-66, but they do not address whether TSC is *required* to provide that information. Defendants refused to stipulate below that the TSA Administrator did, in fact, have access to all the information TSC reviewed. ER 241 ¶¶ 18-19.

[7] Although Defendants cite a Sixth Circuit case to suggest that Plaintiffs must exhaust DHS TRIP procedures to bring a watchlisting challenge, *see* Defs.' Br. 69 n.8 (citing *Shearson v. Holder*, 725 F.3d 588 (6th Cir. 2013)), other courts have disagreed. *See, e.g.*, *Mohamed*, 995 F. Supp. 2d at 534 (holding that "it would be inappropriate to require exhaustion" because "Congress has not mandated exhaustion of the DHS TRIP process" and "there are no regulations . . . that mandate exhaustion"). As *Mohamed* explained, it "could not, under the holding in *Darby v. Cisneros*, require [an individual] to exhaust the DHS TRIP process before proceeding with" APA claims, so "[t]o require exhaustion with respect to [an individual's] other claims . . . would essentially bifurcate substantially related, if not common, claims and create, rather than avoid, piecemeal litigation." *Id.*

Practically speaking, there is no guarantee that the TSA Administrator has the full record as to any given individual. She can only view the individual through TSC's chosen lens.

Finally, TSA depends on TSC to actually implement the TSA Administrator's final decision. Defendants state that, after reviewing TSC's materials, the TSA Administrator "has full authority to order the individual removed from the No Fly List, in which case the individual *will be removed*." Defs.' Br. 65 (quoting ER 231) (emphasis added). But Defendants' use of passive voice obscures the fact that TSC, not TSA, controls the master watchlist of which the No Fly List is a subset, and TSC alone possesses authority to remove a name from the No Fly List. *See* ER 403 ¶ 45.

Ultimately, Defendants' modifications do little to alter the characteristics this Court deemed critical in its previous jurisdictional analysis: "the unique relationship between TSA and TSC in processing" redress requests. *Latif*, 686 F.3d at 1129. The interwoven nature of the redress process renders the "final" order a hybrid of both TSA and TSC decision making. Because Section 46110 does not apply to TSC, jurisdiction over Plaintiffs' substantive challenges lies with the district court.

B. The Changes to the Redress Process Do Not Mitigate this Court's Concerns about Reviewability.

Leaving aside the nature of the decision-making authority, "common sense" still weighs heavily in favor of district court review of blacklisting decisions, as this Court previously held. *See Ibrahim*, 538 F.3d at 1256. *Ibrahim* questioned an appellate court's ability to review an agency decision to blacklist someone because "[t]here was no hearing before an administrative law judge," "no notice-and-comment procedure," and "no administrative record" for the Court to review. *Id.* The Court reasoned that with a process so inadequate and opaque, judicial review should be by "a court with the ability to take evidence." *Id.* Defendants argue that these concerns are no longer present because (1) "the revised procedures are spelled out in detail"; and (2) "an administrative record is available for the court to review." Defs.' Br. 67. That Defendants have partially cured one of the three "common sense" defects this Court identified cannot change the jurisdictional result.

First, Defendants' assertion that "the revised procedures are spelled out in detail" is misleading. Like its predecessor, the revised redress process remains un-codified; it was neither "subject to [] rule-making" nor "published in the Federal Register." ER 239 ¶ 11. The procedures "are memorialized in public court filings" and "inter-agency memoranda *that are not public*." ER 239 ¶ 12 (emphasis added). Defendants also stipulated there may be *ex parte* court filings that "address the

procedures" governing the relationship between TSC and TSA that are "not publicly available." *Id*. And critically, Defendants can change these procedures at any time. During this lawsuit, Defendants have repeatedly provided new details about the revised procedures in supplemental declarations. *See, e.g.*, ER 233-36. The government could make additional changes with absolutely no notice at any time.

Second, Defendants' argument that the administrative record ameliorates this Court's concerns ignores that the record remains incomplete and one-sided. While the revised redress process now includes a partial administrative record, *Ibrahim* did not hold that *any* administrative record—no matter how meager—would suffice to make district court review unnecessary. *See* 538 F.3d at 1256; *Latif*, 686 F.3d at 1129 (remanding for district court "to make an *adequate* record" to support consideration of Plaintiffs' claims (emphasis added)).

The administrative record that forms the basis for the TSA Administrator's decision draws primarily from two sources. First, it includes information TSC deemed "material." ER 230 ¶ 5. Essentially, TSC sifts through its information about an individual, unilaterally determines which pieces are relevant, and includes only that information in the record.

Second, the administrative record contains information submitted by each Plaintiff during the redress process. ER 410 ¶ 15. But this is a dubious safeguard,

because Plaintiffs were not given all the reasons or *any* of the evidence on which the government relied in blacklisting them. *See* ER 573 ¶¶ 16-17. Information provided to each individual also varies. One Plaintiff received a *one-sentence* statement. ER 511, SER 776. Therefore, Plaintiffs have had to guess at the government's concerns, making a complete response virtually impossible. This too renders the administrative record insufficient for purposes of this Court's direct review.

Finally, Defendants ignore that *Ibrahim* also focused on the lack of a hearing when explaining why this Court could not meaningfully review blacklisting decisions. *See Ibrahim*, 538 F.3d at 1256. That factor remains unchanged; Plaintiffs were not afforded a hearing.[8] Thus, the revised redress process still does not provide this Court with adequate information to properly assess the government's watchlisting decision. Just as in *Ibrahim* and *Latif*, judicial review of the blacklisting decision must occur in district court.

[8] Defendants cite *Ibrahim* to argue that "the absence of notice-and-comment procedures" cannot "affect the jurisdictional analysis" because "[t]he lack of a notice and comment procedure cannot overcome a direct statutory command." Defs.' Br. 68 (quoting *Ibrahim*, 538 F.3d at 1256 n.8). But because the orders maintaining Plaintiffs on the list are not the type of "orders" contemplated by Section 46110, *see* Pls.' Br. 82-86, there is no "direct statutory command" in this case.

CONCLUSION

The Court should reverse the district court's judgment and hold that (1) the No Fly List criteria are unconstitutionally vague; (2) the blacklisting redress process violates procedural due process; and (3) the district court retains subject matter jurisdiction over Plaintiffs' substantive claims.

Dated: May 14, 2018

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Pursuant to Circuit Rule 25-5(e), I attest that all other signatories on whose behalf this filing is submitted concur in the filing's content.

Dated: May 14, 2018

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Signature of Attorney or Unrepresented Litigant: s/ Hugh Handeyside

Date: 5/14/2018

("s/" plus typed name is acceptable for electronically-filed documents)

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I hereby certify that on May 14, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/s/ Hugh Handeyside
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